IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

WP(C).No. 32153 of 2006(C)

CC.1722/2002 of ADDL.C.J.M., ERNAKULAM

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PETITIONER:

MOIDEEN SHAH, S/O. MARAKKAR SHAH,
SHAH INTERNATIONAL, NORTH SQUARE,
PARAMARA ROAD, ERNAKULAM.

BY ADV. SRI.JOSHI N.THOMAS
SRI.A.L.GEORGE

RESPONDENTS:

DR.JOSEPH MATHEW,
PALLITHANAM, RESIDNG AT SACRED HEART HOSPITAL
QUARTERS, GREEN GARDENS, CHERTHALA P.O.,
ALAPPUZHA DISTRICT.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

R.BASANT, J.

W.P.C.NO.32153 OF 2006

Dated this the 5th day of December, 2006.

JUDGMENT

When this petition came up for hearing, the learned counsel for the petitioner was pointedly requested to explain how in the light of Section 340 Cr.P.C without filing an appeal under Section 341 Cr.P.C, the petitioner can seek to invoke the jurisdiction of this Court under Article 226/227 of the Constitution. The learned counsel for the petitioner submits that appeal under Section 341 Cr.P.C is possible only when an application to make a complaint under Section 340 Cr.P.C has been rejected refusing to make a complaint. According to the petitioner, such refusal, can be done only after conducting enquiry as contemplated under Section 340 Cr.P.C. In as much as no such completed enquiry has been conducted, it cannot be held to be a refusal to make a complaint. This is, in fact, a refusal to conduct enquiry and therefore the proper remedy is not an appeal under Section 341 Cr.P.C, it is submitted.

2. I am unable to agree with the learned counsel for the petitioner. The order impugned, copy of which is produced as Ext.P6, clearly shows that the learned Magistrate felt after

examining CW1-the petitioner, that no further enquiry need be proceeded with and on the available materials, the prayer to make a complaint under Section 340 Cr.P.C can be dismissed. The impugned order is therefore one which is squarely appealable under Section 341 Cr.P.C. The fact that sufficient enquiry has not been conducted before passing the impugned order is also a ground which can be taken in a properly instituted appeal under Section 341 Cr.P.C.

3. This Writ Petition must in these circumstances be held to be not maintainable as the petitioner has a remedy under the specific provisions of the Code of Criminal Procedure to challenge the impugned order.

4. This Writ Petition is, in these circumstances, dismissed. I may hasten to observe that the dismissal of this petition will not in any way fetter the rights of the petitioner to prefer an appeal under Section 341 Cr.P.C in accordance with law.

5. Hand over a copy of this order to the learned counsel for the petitioner today itself.

(R.BASANT, JUDGE)

rtr/